OG MARINE SDN BHD & ANOR v. GLENMARIE COVE DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[ADMIRALTY PERSONAM NO: 24NCC-287-08-2015]
5 JANUARY 2016

MARITIME LAW: *Jurisdiction – Claims – Damages – Barge collision – Negligence – Application to transfer suit to admiralty court – Whether claim for damages fell within s. 20(2)(e) of Supreme Court Act 1981 & Practice Direction No 1 of 2012 – Whether seeking damages in sum of RM735,813.12 within jurisdiction of Sessions Court – Whether cases filed in admiralty court involve actions in rem – Defence of limitation under s. 360 of Merchant Shipping Ordinance 1952 – Whether applicable – Whether case should be transferred to admiralty court*

SHIPPING: *Jurisdiction – Admiralty jurisdiction – Claim for damages due to negligence – Application to transfer suit to admiralty court – Whether claim for damages fell within s. 20(2)(e) of Supreme Court Act 1981 & Practice Direction No 1 of 2012 – Whether seeking damages in sum of RM735,813.12 within jurisdiction of Sessions Court – Whether cases filed in admiralty court involve actions in rem – Defence of limitation under s. 360 of Merchant Shipping Ordinance 1952 – Whether applicable – Whether case should be transferred to admiralty court*

COURTS: *Transfer of suit – Application for – Claim for damages due to negligence – Application to transfer suit to admiralty court – Whether claim for damages fell within s. 20(2)(e) of Supreme Court Act 1981 & Practice Direction No 1 of 2012 – Whether seeking damages in sum of RM735,813.12 within jurisdiction of Sessions Court – Whether cases filed in admiralty court involve actions in rem – Defence of limitation under s. 360 of Merchant Shipping Ordinance 1952 – Whether applicable – Whether case should be transferred to admiralty court*

The defendant, the owner and operator of a jetty at Precinct 1, Pelabuhan Klang, appointed Comtrac Sdn Bhd as the main contractor to carry out earthworks, river protection works and other associated works ('the works') at Precinct 4. Comtrac subsequently appointed the second plaintiff as its sub-contractor to carry out the works. In the course of carrying out the sub-contracted works, the second plaintiff had hired a barge ('Oceanline 237'), owned by the first plaintiff for the purpose of transporting materials for the works. On 25 February 2012, the barge drifted from its mooring and/or anchoring and collided with the jetty, causing damages to the jetty. The defendant contended that collision was caused by the negligence of the first and/or second plaintiffs. Therefore, the defendant sued the first and the second plaintiffs. The plaintiffs filed this application to transfer the said suit to this admiralty court on these grounds that (i) the admiralty court was a specialised court set up to adjudicate admiralty claims pursuant to the Practice Direction 1 of 2012 Admiralty and Maritime Claims and that the

defendant's claim was suitable to be heard by the admiralty court; (ii) the first and second plaintiffs would plead defence of limitation of liability under s. 360 of the Merchant Shipping Ordinance 1952 to answer the claim in the High Court suit; and (iii) the admiralty court was the best forum to try this suit.

Held (dismissing application):

(1) Pursuant to the Practise Direction 1 of 2012, the admiralty court and any High Court shall hear maritime claims, as specified in para. 2. Under para. 2(n), the Admiralty Court Kuala Lumpur and any High Court may hear appeals in respect of a maritime claim determined by the subordinate courts. Under para. 3, it is provided that subject to the consent of all parties 'any appeal in respect of a maritime claim from a subordinate court in Malaya may be transferred to the admiralty court Kuala Lumpur.' (para 14)

(2) The defendant's claim against the plaintiffs in the Sessions Court was for damages, arising out of the collision between the barge Oceanline 237, owned by the first plaintiff and chartered to the second plaintiff, and the defendant's jetty thereby causing damages to the jetty owned by the defendant. The defendant's claim would fall within s. 20(2)(e) of the Supreme Court Act 1981 (any claim for damage done by a ship) and para. 2(j) of the Practice Direction 1 of 2012 (any claim for loss or damage out of a marine activity, which includes ports, docks, beths ..." The defendant had filed its action in the Sessions Court for negligence and sought damages in the sum of RM735,813.12, which was within the jurisdiction of the Sessions Court. There was therefore no issue that the Sessions Court had the jurisdiction to hear this suit. (paras 15-17)

(3) One of the main objectives of the establishment of the admiralty court is to resolve maritime dispute expeditiously. The collision happened in 2012, yet the action was only filed in 2015, three years after the collision. Therefore, the parties did not find the urgency in seeking redress, especially in this case where the insurance sum of RM709.813.12 had been paid in full by the insurer to the defendant, provided that the defendant's rights were subrogated to the insurer. (para 19)

(4) Most cases filed in admiralty court involve actions *in rem*, where warrants of arrest are issued to arrest the ship or property and hold it in place. These cases require the admiralty court to resolve the maritime dispute expeditiously. The admiralty court should not be clogged with trials of simple negligence suits, arising from drifting barges, which were within the jurisdiction of the subordinate courts. (para 20)

(5) The defence of limitation under s. 360 of the Merchant Shipping Ordinance 1952 would limit the plaintiffs' liability in damages, if the collision had occurred without their 'actual fault or privity.' Therefore, in their statement of defence, there was no indication that the plaintiffs had a valid defence of limitation of liability under the said section. Thus, there was no necessity for the case to be transferred to the admiralty court for trial. (paras 23-25)

Case(s) referred to:

Pemilik Dan Sesiapa Berkenaan Dengan Kapal Atau Vesel "SITI AYU" Dan "MELATI JAYA" v. Sarawak Oil Palm Sdn Bhd & Anor [2006] 1 CLJ 126 CA ***(refd)***

Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The "BORCOS TAKDIR" [2012] 1 LNS 1116 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24(b)
Merchant Shipping Ordinance 1952, s. 360
Rules of Court 2012, O. 57 r. 1

Supreme Court Act 1981 [UK], s. 20(2)(e)

For the plaintiffs - Wiwin; M/s TS Oon & Partners
For the defendant - Mahathir Abdullah; M/s Athi Seelan Mahathir & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Application

[1] The plaintiffs' originating summons is an application that the action in Civil Suit No: B53-1-07-2015 be transferred from the Shah Alam Sessions Court to the admiralty court in Kuala Lumpur pursuant to s. 24(b) of the Courts of Judicature Act 1964, O. 57 r. 1 of the Rules of Court 2012 and Practise Direction No. 1 of 2012 Admiralty and Maritime Claims.

[2] After hearing the application, the same is dismissed with no order as to costs.

The Salient Facts

[3] The defendant is the owner and operator of a jetty at Precinct 1, PT 1040-43, Glenmarie Cove, Off Jalan Teluk Gong, Pelabuhan Klang, Selangor.

[4] The defendant appointed Comtrac Sdn Bhd as the main contractor to carry earthworks, river protection works and other associated works ('the works') at Precinct 4, Lot 18 Klang, Selangor. Comtrac subsequently appointed the second plaintiff as its sub-contractor to carry out the works. (see para. 6 of the statement of claim in Suit No: B53-1-07-2015)

[5] In the course of carrying the subcontracted works, the second plaintiff has hired a barge, Oceanline 237, owned by the first plaintiff for the purpose of transporting materials for the works. (see para. 7 of the SOC)

[6] On 25 February 2012, the barge drifted from its mooring and/or anchoring and collided with the jetty, causing damages to the jetty ('the collision'). (see para. 8 of the SOC).

[7] The defendant contends that collision was caused by the negligence of the first and/or the second plaintiffs. Therefore, the defendant sued the first and the second plaintiffs in the Shah Alam Sessions Court in Civil Suit No: B53-1-07-2015 for negligence and seeking damages in the sum of RM735,813.12.

[8] The plaintiffs herein, being the first and second defendants in the Shah Alam Sessions Court suit, have not exhibited any statement of defence. Instead, the first and second plaintiffs filed this application to transfer the said suit to this admiralty court.

[9] After hearing the parties, and despite the consent of the defendant, this application has been dismissed by this court.

The Findings Of The Court

[10] The plaintiffs' application is premised on three grounds:

(i) that the admiralty court in Kuala Lumpur High Court is a specialised court set up to adjudicate admiralty claims pursuant to the Practice Direction No. 1 of 2012 Admiralty and Maritime claims and that the defendant's claim is suitable to be heard by the admiralty court;

(ii) that the first and second plaintiffs (as the defendants in the Shah Alam suit) will plead defence of limitation of liability under s. 360 of the Merchant Shipping Ordinance 1952 to answer the claim in the Shah Alam suit; and

(iii) that the admiralty court is the best forum to try this suit.

[11] It is not in dispute that the admiralty court in Kuala Lumpur High Court is a specialised court set up to adjudicate admiralty claims in 2010. The admiralty court was launched on 30 September 2010 and takes effect from 1 October 2010. The admiralty court was launched to meet the needs of the maritime industry in resolving their disputes competently and expeditiously.

[12] The jurisdiction to deal with matters of admiralty is provided under s. 24(b) of the Courts of Judicature Act 1964, which reads:

> 24. Civil Jurisdiction
>
> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:

(a) ...

(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; ...

[13] The admiralty jurisdiction of the High Courts in England under the Supreme Court Act 1981 can be found in s. 20 of the same 1981 Act. The application of the Supreme Court Act 1981 can be seen from the case of *Pemilik Dan Sesiapa Berkenaan Dengan Kapal Atau Vesel "SITI AYU" Dan "MELATI JAYA" v. Sarawak Oil Palm Sdn Bhd & Anor* [2006] 1 CLJ 126, where the Court of Appeal held that:

The extent of the admiralty jurisdiction of the Admiralty Court is set out in s. 20(1) of the 1981 Act. It states as follows:

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:

(a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-s (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the admiralty court.

Then under s. 20(2) of the 1981 Act a comprehensive list of "maritime claims" are spell out as follows:

(2) The questions and claims referred to in sub-s (1)(a) are:

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of:

A (i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

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(g) any claim for loss of or damage to goods carried in a ship;

C (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(i) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under (section 87 of the Civil Aviation Act 1982), of the law relating to salvage to aircraft and their apparel and cargo);

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(j) any claim in the nature of towage in respect of a ship or an aircraft;

(k) any claim in the nature of pilotage in respect of a ship or an aircraft;

E (l) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(m) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

F (n) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

G (p) any claim arising out of an act which is or is claimed to be a general average act;

(q) any claim arising out of bottomry;

(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been

H attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

[14] Subsequently, Practise Direction No. 1 of 2012 Admiralty and Maritime Claims was issued on 21 February 2012. Pursuant to this Practise Direction No. 1 of 2012, the Admiralty Court Kuala Lumpur and any High

I Court shall hear maritime claims, as specified in para. 2. Under para. 2(n), the Admiralty Court Kuala Lumpur and any High Court may hear appeals in respect of a maritime claim determined by the subordinate courts. Under

para. (3), it is provided that subject to consent of all parties, "any appeal in respect of a maritime claim from a subordinate court in Malaya may be transferred to the Admiralty Court Kuala Lumpur." A

[15] The defendant's claim against the plaintiffs in the Sessions Court Shah Alam is for damages, arising out of the collision between the barge Oceanline 237, owned by the first plaintiff and chartered to the second plaintiff, and the defendant's jetty, thereby causing damages to the jetty owned by the defendant. B

[16] It is not in dispute that the defendant's claim would fall within s. 20(2)(e) of the Supreme Court Act 1981 (any claim for damage done by a ship) and para. 2(j) of the Practise Direction No. 1 of 2012 (any claim for loss or damage out of a marine activity, which includes ports, docks, beths …". C

[17] However, it is also not in dispute that the defendant has filed its action in the Sessions Court in Shah Alam for negligence and seeking damages in the sum of RM735,813.12, which is within the jurisdiction of the Sessions Court. There is therefore no issue that the Sessions Court in Shah Alam has the jurisdiction to hear this suit. D

[18] The next issue is whether the Admiralty Court Kuala Lumpur is the 'most suitable and best forum' to hear this suit as contended by the plaintiffs. Bearing in mind that the defendant's cause of action is simply for negligence, that the plaintiffs' barge has "drifted from its mooring and/or anchoring and collided with the jetty, causing damages to the jetty", it cannot be said to be a special case that needs the immediate attention of the Admiralty Court Kuala Lumpur. E F

[19] We must not lose sight of one of the main objectives of the establishment of the admiralty court, which is to resolve maritime dispute expeditiously. In the present case, the collision happened in 2012, yet the action was only filed in 2015, three years after the collision. Therefore, the parties do not find the urgency in seeking redress, especially in this case where the insurance sum of RM709,813.12 has been paid in full by the insurer to the defendant, provided that the defendant's rights were subrogated to the insurer. G

[20] Added to that, most cases filed in the Admiralty Court Kuala Lumpur involve actions *in rem*, where warrants of arrest are issued to arrest the ship or property and hold it in place. These cases require the admiralty court to resolve the maritime dispute expeditiously. With limited time and manpower, the admiralty court should not be clogged with trials of simple negligence suits, arising from drifting barges, which are within the jurisdiction of the subordinate courts. The parties however, may by consent, apply for the appeal to be transferred to the admiralty court pursuant to para. 3 of Practise Direction No. 1 of 2012. H I

[21] The next issue is whether the plaintiffs' proposed defence of limitation of liability under s. 360 of the Merchant Shipping Ordinance 1952 makes this case more appropriate to be tried in the admiralty court. Section 360 of the Merchant Shipping Ordinance 1952 reads as follows:

> 360. Limitation of owner's liability in certain cases of loss of life, injury or damage
>
> (1) The owner of a Malaysian or foreign ship shall not, where all or any of the following occurrences take place without his actual fault or privity, namely;
>
> (a) where any loss of life or personal injury is caused to any person being carried in the ship;
>
> (b) where any damage or loss is caused in any goods, merchandise or other things whatsoever on board the ship;
>
> (c) where any loss of life or personal injury is caused to any person not carried in the ship through the act of any person, whether on board the ship or not, in the navigation or management of the ship, or in loading, carriage or discharge of her cargo, or in the embarkation, carriage or disembarkation of her passenger, or through any other act of any person on board the ship, be liable to damages beyond the following amounts:
>
> (aa) in respect of loss of life or personal injury, either alone or together with such loss, damage or infringement as is mentioned in paragraphs (b) and (d), an aggregate amount not exceeding an amount equivalent to three thousand one hundred gold francs for each ton of the ship's tonnage; and
>
> (bb) in respect of such loss, damage or infringement as is mentioned in paragraphs (b) and (d), whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of the ship's tonnage.

[22] In *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The "BORCOS TAKDIR"* [2012] 1 LNS 1116, Justice Nallini Pathmanathan held that:

> In order to enjoy the benefit of the tonnage limitation granted under the provisions of the Merchant Shipping Ordinance 1952 in respect of the physical damage occasioned as a consequence of the anchor snagging on the oil pipeline, the shipowner needs to establish that the incident occurred without the shipowner's 'actual fault or privity'. The burden lies on the Defendant to establish that the incident occurred without its actual fault or privity. (see *Antara Koh Pte. Ltd v. Eng Tou Offshore Pte Ltd.* [2005] 4 SLR 521).

[23] The defence of limitation under s. 360 of the Merchant Shipping Ordinance 1952 would limit the plaintiffs' liability in damages, if the collision have occurred without their 'actual fault or privity'. Therefore, in their statement of defence to the Shah Alam suit, the onus is on the plaintiffs to plead facts that the collision have occurred without their 'actual fault or privity'.

[24] However, as the plaintiffs have not exhibited their statement of defence for the Civil Suit No: B53-1-07-2015 in the Shah Alam Sessions Court, I am not in any position to say that the plaintiffs have a valid defence of limitation of liability under s. 360 of the Merchant Shipping Ordinance 1952.

[25] Premised on my reasons above, and since the pleaded case before the Sessions Court is based on negligence, which is within the jurisdiction of the Sessions Court, I do not see the necessity for the case to be transferred to the admiralty court for trial. Upon the completion of the trial, by consent, parties may apply for the appeal to be heard by the admiralty court.